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NEWSLETTER

Third-Party Claimant Lacks Standing to Sue D&O Insurer

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A federal district court, applying California law, has held that a third-party claimant lacks standing to sue a D&O insurer to collect a default judgment, rejecting arguments that the third party has the right to do so (1) under a California insurance statute or, alternatively, (2) as an intended third-party beneficiary to the insurance contract. *GDF Int'l, S.A. v. Assoc. Elec. & Gas Ins. Servs. Ltd.*, No. C 02-02916 CRB, 2003 WL 926790 (N.D. Cal. Mar. 4, 2003).

A third party sued the policyholder company and three of its directors for securities fraud based on allegations that the company's directors had made false statements regarding the company's preferred stock. After voluntarily dismissing the directors, the third party received a $10 million default judgment against the company and then filed a direct action against the insurer under California Insurance Code Section 11580 to collect on the judgment, or in the alternative, as an intended third-party beneficiary to the insurance contract.

The court rejected the third party's argument that it had standing to sue under Section 11580, which enables a judgment creditor, in certain situations, to bring a direct action against a liability insurer when the insured is bankrupt or insolvent. Among other requirements, the judgment creditor must have "obtained a judgment for bodily injury, death, or property damage." The court reasoned that a judgment for securities fraud was not a judgment for bodily injury, death or property damage. The court noted that the third-party creditor had not provided any support for its theory "that a decline in the value of intangible property is a form of 'property damage' within the meaning of the statute."

The court also rejected the third party's argument that it had standing as an intended third-party beneficiary to the insurance contract. The court first noted that "[a]s a general rule, absent an assignment of rights or final judgment involving Section 11580, a third party claimant may not bring a direct action against an insurance company on an insurance contract because the insurer owes a duty only to the insured." The court reasoned that language in the insurance policy at issue obligating the insurer to "pay on behalf of" the directors and officers and the company reflected a duty to settle running to the insureds, not the third-party claimant. The court contrasted the obligation under a D&O policy with a medical-payment provision, which "is widely recognized as a provision intended to benefit third parties." In the case of a medical-payment provision, the court explained, an insurer's payment obligation is premised on the injury to the third party and not fault on the part of the insured, which is why the injured party is deemed to be an intended beneficiary. The D&O

policy at issue in this case required payment only after the insured was found to be at fault. Accordingly, the court concluded that "[e]ven though [the third party] would stand to gain from the contract's enforcement, it is merely an incidental beneficiary who would 'fortuitously' benefit from [the insurer's] agreement to indemnify the insured."

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130